IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-83

Supreme Court, U. S.
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LT. JOHN A. STRAIT,

Petitioner,

—v.—

HON. MELVIN R. LAIRD,
Secretary of Defense, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

JOHN T. HANSEN
555 Polk Street
San Francisco, California 94102

JOHN A. STRAIT
204 Grand View Avenue
San Francisco, California 94114

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, New York 10010

MICHAEL N. POLLET
1345 Avenue of the Americas
New York, New York 10019

Attorneys for Petitioner

PAUL HALVONIK
American Civil Liberties Union of Northern California
593 Market Street
San Francisco, California 94105
Of Counsel

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I.

Summary.

The Brief of Respondents adds nothing of substance to the *per curiam* opinion of the Court of Appeals, although their more elaborate development of the issues reveals how completely the result below is divorced from reality. They argue in a legal vacuum, devoid entirely of support in fact, practical or policy considerations, or legal and legislative history. Moreover, where such factors were addressed by petitioner in his brief, respondents have ignored them, denigrated them, and distorted them, but in no instance have they offered any countervailing rationale of their own.

II.

Facts.

Respondents' presentation of the facts is frequently misleading and erroneous, as the following examples show.

1. Respondents portray petitioner as a temporary and fortuitous resident of California (Brief of Resp. 15 and 21, n. 14), whereas in truth he had been a permanent resident of Northern California since birth (Brief of Pet. 4-5 and 21), having left the state only temporarily during three academic years to attend law school.

2. Respondents analogized petitioner to a "furloughed soldier" (Br. of Resp. 21, n. 14), relying on the false assumption that he had been "assigned" to the Yale Law School and was permitted a brief interruption in that "assignment" in order to take the California bar examination. In truth, the choice of law school was entirely the petitioner's; the only restriction being that he attend "an approved and recognized institution. . . ." AR 601-25, para. 2-3(b)(1) (see Br. of Resp. 45). Respondents have developed this false analogy in order to obscure the crucial differences between this case and *Schlanger* v. *Seamans*, 401 U.S. 487 (1971). Sgt. Schlanger, who had been assigned to a functioning military unit, was indeed a furloughed soldier. Lt. Strait, on the other hand, had only a record-keeping assignment and a nominal commanding officer (Br. of Pet. 32, n. 10). Thus, the only substantial similarity between the two cases—the physical absence of the commanding officer from the district—is obscured and distinguishable.

3. Respondents depict petitioner's conscientious objector claim as presenting a close question on the merits (Br. of Resp. 29, n. 20). Yet every Army officer who interviewed Lt. Strait found him to be sincere, and a three-judge panel of the Court of Appeals unanimously found the denial of his application factually baseless and, in part, legally erroneous (App. 66-8, 72-74).

4. Respondents state that Lt. Strait did not specifically set forth the claim that his application was not processed according to Army regulations (Br. of Resp. 30, n. 21). The statement is in error; the specific irregularities are described in the Amended Petition (App. 36) and in the Brief of Petitioner, p. 7, n. 3.[1]

III.

Habeas corpus.

Respondents argue that the District Court did not have habeas corpus jurisdiction on the sole ground that the Army officer designated as petitioner's commanding officer was not physically present in the district where the petition was filed. To deny a habeas petitioner access to court

[1] Lt. Strait alleged that much of the record upon which the Army relied was created without his knowledge and therefore without his having an opportunity to respond to highly prejudicial and inaccurate information contained therein (App. 36). He has not fully developed the substance of these allegations here since that question is not before this Court. In the present posture of the case, i.e., on respondents' motion to dismiss, those allegations must be admitted as true. E.g., *Walker Process Equip. Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 174-175 (1965). In any event these same allegations of irregularity have recently been found meritorious by the Second Circuit. *Friedberg* v. *Resor*, —— F.2d ——, 5 SSLR 3028 (2d Cir. No. 71-1573, decided 12-29-71). See also, *Crotty* v. *Kelly*, 443 F.2d 214 (1st Cir. 1971).

on such a slender thread would seem to require potent support in policy, practical needs, or legislative and legal history. There is none.

A. *No Policy Interests Are Advanced by the Result Urged by Respondents.*

Respondents urge that the commanding officer must be physically present because "effective relief depends upon the court's ability to compel the custodian to obey its mandate . . ." (Br. of Resp. 18-9). Nevertheless, respondents do not say why, in a purely federal, habeas corpus proceeding, such *physical* presence is necessary when physical presence was never relied upon to establish and maintain the bonds sought to be broken; especially when the custodian has established substantial contact with the petitioner in the district.

Indeed, respondents concede that Lt. Strait was "'in custody' within the district where [he] reside[d] pursuant to Army authorization" (Br. of Resp. 11), and that he "would be as much 'in custody' where his RCPC commander is, . . . as he would be in California when located there" (*Id.* at 23). But they say he cannot obtain judicial release from this custody unless he leaves the very place where he is restrained and establishes a new and different residence (even though the new residence need be but fleeting). This "Mexican divorce" approach to the Great Writ demeans its value and exalts form over substance without serving any legitimate policy function.

It is far more appropriate to avoid such fabricated *physical presence* requirements and to honor reality by relying upon traditional indicia of *jurisdictional presence* (Br. of

Pet. 31-2) in unattached reservist cases. Many courts have adopted this approach. *Arlen* v. *Laird,* 451 F.2d 684 (2d Cir. 1971); *Strieb* v. *Gasiewicz,* 3 SSLR 3729 (7th Cir. 1970); *United States ex rel. Armstrong* v. *Wheeler,* 321 F. Supp. 471 (E.D. Pa. 1970); *Donigian* v. *Laird,* 308 F. Supp. 449 (D. Md. 1969); *Nason* v. *Secretary of the Army,* 304 F. Supp. 422 (D. Mass. 1969); *Decker* v. *Wheeler,* 3 SSLR 3286 (D. Minn. 1970).

Respondents contend that jurisdictional presence through contacts is not adequate because the writ cannot be effected outside the issuing court's jurisdiction (Br. of Resp. 20, n. 13), but, again, they fail to say why this should be so. Moreover, they have overlooked the existence of 28 U.S.C. §1391(e), which at a minimum can be used to *effect* service of process (where the respondents are federal officers) in aid of habeas corpus jurisdiction otherwise found to exist.[2] *Smith* v. *Campbell,* 450 F.2d 439 (9th Cir. 1971); cf., *Ex Parte Endo,* 323 U.S. 283 (1944).

B. *Practical Considerations.*

Petitioner described the hardships that non-unit reservists would encounter if forced to seek judicial review of denials of discharge either in the district where the Reserve Centers are located or after they are on active duty (Br. of Pet. 41-6), and contended that such a harsh result ad-

[2] No explanation is offered why the physical congruity of a United States District Judge and a federal custodial officer is necessary to insure, or will even enhance, obedience to the writ. Undoubtedly proper and adequate service of process will encourage obedience, but Congress has said that 28 U.S.C. §1391(e) may serve this purpose in civil cases. Nevertheless initially finding jurisdictional presence independent of §1391(e) as was done here may be required to prevent an indirect expansion of the scope of 28 U.S.C. §2241 (Br. of Pet. 33).

vances no interest of the government (*Id.* 46-51). Respondents suggest that these hardship contentions are overblown (Br. of Resp. 24-5). (By their silence, however, they apparently concede that a contrary rule would have no detrimental impact on the government.)[3]

With respect to financial considerations alone, the government's brief shows a lack of sensitivity to the burdens which litigation imposes upon the average citizen. Respondents suggest that petitioner could invoke the habeas corpus jurisdiction of the district court in St. Louis, Missouri, by flying there "in a matter of hours" (Br. of Resp. 24), and that his "counsel could of course travel to the RCPC as easily as petitioner" (*Id.* at 25). They apparently do not realize that the added costs thus incurred (air fare, hotel and other travel expenses, per diem charges by counsel for each day away from his office, the expenses of retaining additional local counsel in Missouri) would put habeas corpus actions financially out of the reach of most citizens.

If a reservist cannot bear these costs, respondents contend, he can simply report for active duty at Army expense and then file his petition (Br. of Resp. 24). But, this alternative is not available to a reservist whose active duty will not commence until some future and perhaps undetermined date. E.g., *Nason* v. *Secretary of the Army, supra.* Such a non-affluent, delayed active-duty reservist would thus be

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[3] The only argument even tenuously advanced is that the rule urged by petitioner will create jurisdiction in numerous situations for "all servicemen" (Br. of Resp. 14, n. 10). No reason is offered why such a result should be disfavored; in any event the statement is an exaggeration. Lt. Strait seeks only a rule applicable to unattached, inactive reservists—a result further controlled by rules relating to venue, *forum non conveniens,* and interlocutory relief (Br. of Pet. 47-51).

relegated to a litigative limbo. And even a reservist with an immediate activation date still faces a serious problem regarding the assistance of counsel (Br. of Pet. 42-3). Must he seek and retain entirely new and unfamiliar counsel upon reporting for active duty, or will he pay to transport his present counsel across country (again at great cost)?

Nor is it true that whether petitioner must go on active duty is not in dispute (Br. of Resp. 24, n. 18). The Second Circuit answered that contention in *Arlen* v. *Laird, supra* at 687, where it rejected the notion that "the petitioner [must] leave his home and his work in order to contest the power of the Army to force him to do so." See also, *Scaggs* v. *Larsen,* 396 U.S. 1206 (1969) [Douglas, J. in chambers]; *Berman* v. *Resor,* 302 F. Supp. 1200, 1202 (N.D. Cal. 1969). At least one paramount feature of the writ of habeas corpus is its prompt availability, and this is as important in testing military restraints as in any other context. *Parisi* v. *Davidson,* —— U.S. ——, 40 U.S. Law Week 4177 (decided 2-23-72).

C. *The Potential for Serious Concentration of Cases Exists.*

Respondents cite figures and claim that the District Court where the Reserve Center is located will not become overburdened (Br. of Resp. 26-7). But they cited only conscientious objector discharge statistics for 1971, and did not offer figures for other years or for the other categories of administrative discharge which a reservist could seek.[4]

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[4] There are reported habeas corpus actions by unsuccessful reserve discharge applicants in other categories, of which the following are examples:

(*continued on following page*)

The Amici Curiae inform us that there are approximately 2,000,000 reserve servicemen assigned to the U.S. Army Reserve Components Personnel and Administration Center at St. Louis. Petitioner does not begin to suggest that even a significant number of these individuals will seek administrative discharge, or even judicial vindication of a denial of such a request. Nevertheless, post-discharge-denial habeas petitions by even a small percentage of those so assigned could easily engulf a single district court. Thus, the important *fact* is that the rule urged by respondents would create a situation of potential seriousness.

D. *Legislative and Legal History.*

The bizarre solution offered by respondents to Lt. Strait's dilemma—that he fly to St. Louis and establish a scintilla of custody there—runs exactly contrary to the paramount purpose behind the territorial jurisdiction criteria incorporated into the habeas corpus statute by Congress, namely, that petitioners be required to bring such actions where they are actually physically located in order to avoid their transportation about the country (Br. of Pet. 25-6). The very concept of itinerant habeas petitioners, travelling about the country in an effort to establish "complete" custody, defies all notions associated with the Great Writ. Indeed, the "body" referred to in respondents' view of

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1. Medical—*Patterson* v. *Stancliff*, 4 SSLR 3644 (D. Vt. 1971).
2. Individual hardship—*United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968).
3. Community hardship—*United States ex rel. Hutcheson* v. *Hoffman*, 439 F.2d 821 (5th Cir. 1971).
4. Minister of religion and/or divinity student—*Barr* v. *Weise*, 293 F. Supp. 7 (S.D.N.Y. 1968), *modified*, 412 F.2d 338 (2d Cir. 1969).

habeas corpus is now apparently the body of the custodian, the petitioner having become somewhat irrelevant.

Respondents have cited no legislative or judicial history to support their theory that the presence of the custodian is a subject matter jurisdiction requirement. Their attempt now to cast *Schlanger* v. *Seamans, supra,* as a new departure (rather than a restatement of personal jurisdiction concepts) is at odds with their own contentions in that case (see Br. of Pet. 24).

In short, respondents' arguments are devoid of any foundation in the facts of this case, practical realities of a more general nature, policy considerations, or legislative history. This Court should not adopt a rule that, without serving any countervailing interest, will impose serious hardships on a significant class of habeas petitioners and thus contract the availability of the Great Writ.

IV.

Mandamus.

Petitioner's brief challenged the Ninth Circuit's view of mandamus jurisdiction under 28 U.S.C. §1361, as stated in *Jarrett* v. *Resor,* 426 F.2d 213 (9th Cir. 1970). In reply, respondents defend the Ninth Circuit's position, relying heavily, as their authority, on—*Jarrett* v. *Resor* (*id.* 28, 31 and 32). Such reasoning typifies the strength of respondents' contentions.

1. Trotting out meaningless, "ministerial-discretionary" terminology, respondents claim that the Army's decision herein is unreviewable in mandamus because it was "discretionary." But, as Chief Justice John Marshall noted, discretionary acts are "in their nature political," where

the officer or agency has acted as "the mere organ of executive will. . . ." *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 170 (1803). Surely, respondents do not mean that the Army's decision here was a "political" one. Rather, they must concede that the decision here is an action where the Secretary of the Army (or his designee) "is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid. . . ." *Id.* This has remained the basic approach to executive discretion over the years and was reaffirmed as recently as last Term. See *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410-13 (1971); Brief of Pet. 54-57.

Respondents attempt to include in the scope of "discretion" any actions that require the weighing of facts and application of law to those facts is inconsistent with that understanding The mere fact that an administrative determination is complex or difficult does not render it "discretionary" and therefore insulated from judicial review under mandamus, *Roberts* v. *United States,* 176 U.S. 221, 231 (1900); *Carey* v. *Local Board No. 2,* 297 F. Supp. 252, 254-5 (D. Conn.), *aff'd,* 412 F.2d 71 (2d Cir. 1969); although the fact that the process does require some extensive fact-finding and law-applying may make it more easily supportable on the merits, especially under the narrow, "basis-in-fact" test.[5] But this buttresses the conclusion that the

[5] It is not true as suggested (Br. of Resp. 31) that the basis-in-fact test was developed in conscientious objector cases because of special deference to the expertise of the agency. That standard applies equally to less subjective determinations of draft boards and their military counterparts. It was primarily invoked to make the system of obtaining military manpower more efficient by reducing the scope of judicial review. See, *Estep* v. *United States,* 327 U.S. 114, 128 and 133 (1945) [Murphy, J., and Rutledge, J., concurring].

scope of review here sought is in the nature of mandamus, for when even the relatively stringent basis-in-fact test cannot be met, then the military authorities, as "a mere perfunctory or ministerial matter" should have granted the discharge application. *Still* v. *Commanding Officer*, 334 F. Supp. 617, 622 (N.D. Ala. 1971).

2. Respondents' argument fails for another reason—the Army's decision was not a "close" result where the facts were carefully weighed and the law diligently applied. The record reveals that Lt. Strait in fact clearly met each of the required criteria for discharge and that the Army's determination was both legally erroneous (App. 66), see, *Rosengart* v. *Laird*, —— U.S. ——, 40 U.S. Law Week 3393 (decided 2-22-72); *Clay* v. *United States*, 403 U.S. 698 (1971), and factually baseless (App. 68).[6] The Army owed Lt. Strait a "clear duty" to decide his claim according to the law and the facts, a duty it did not perform.

3. Finally, respondents advance two technical objections to mandamus jurisdiction: (a) that the district court had discretion not to proceed in mandamus because another remedy existed and (b) that Lt. Strait did not seek the kind of relief that can be afforded in mandamus.

a. Even if a district court may discretionarily refuse to proceed in mandamus because another remedy exists, it was improper for the Court of Appeals to exercise that discretion on behalf of the district judge, particularly since the Court of Appeals did *not* find that it would have been an abuse of discretion for the district court to have pro-

[6] While the district judge disagreed, he entered no findings of fact or conclusions of law to support his order, and he was unanimously reversed on that question by the Court of Appeals.

ceeded in mandamus (App. 76). More importantly, the district court does not have such discretion. The court *must* proceed in mandamus if petitioner "has no other specific legal remedy . . ." *Marbury* v. *Madison, supra* at 169, but where a specific legal remedy (which thus becomes the exclusive remedy) exists, the court must likewise refrain. *Carter* v. *Seamans,* 411 F.2d 767, 773 (5th Cir. 1969). Here, habeas corpus is neither a specific, statutory remedy nor a legal one; it is an equitable, non-statutory remedy that stands on the same footing as mandamus. Accordingly, *Carter* v. *Seamans, supra,* relied on by both the court below and respondents, is inapposite.

b. Petitioner not only sought an order discharging him from custody; he also requested declaratory and injunctive relief (App. 37)—remedies quite consistent with his claims of procedural irregularity. But, respondents contend, since the district court could not discharge Lt. Strait from custody pursuant to its mandamus power, it should grant no relief at all (Br. of Resp. 32). Nevertheless, the court certainly has ample power under the All Writs Statute (28 U.S.C. §1651), the Declaratory Judgment Act (28 U.S.C. §§2201-2), and its inherent injunctive authority to fashion a more than adequate remedy that would sever Lt. Strait's legal obligations to the Army. Cf., *Massachusetts* v. *Laird,* 400 U.S. 886, 899 (1970) (Douglas, J., dissenting).

V.

Other remedies.

With regard to jurisdiction under the Administrative Procedure Act, the respondents' quarrel is more with the decisions of this Court than with the petitioner.

As to federal question jurisdiction, respondents concede that it provides an additional basis for jurisdiction, but they attempt to fabricate out of whole cloth a doctrine of discretionary federal question jurisdiction (Br. of Resp. 37). It is revealed as the sham it is by the complete absence of any cited authority supporting the novel suggestion.[7]

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[7] The authorities cited at p. 37, n. 25, *id.*, are inapposite. They merely restate the rule that the Declaratory Judgment Act is not an independent jurisdictional statute. They have nothing to do with 28 U.S.C. §1331(a).

CONCLUSION

For the reasons stated herein and in Petitioner's Opening Brief, Lt. Strait urges that the judgment below be reversed, and the cause remanded for re-instatement of the judgment of February 17, 1971.

March, 1972

Respectfully submitted,

JOHN T. HANSEN
555 Polk Street
San Francisco, California 94102

JOHN A. STRAIT
204 Grand View Avenue
San Francisco, California 94114

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010

MICHAEL N. POLLET
1345 Avenue of the Americas
New York, New York 10019

Attorneys for Petitioner

PAUL HALVONIK
American Civil Liberties Union
of Northern California
593 Market Street
San Francisco, California 94105
Of Counsel